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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

**U.S. Citizenship
and Immigration
Services**

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FILE:

Office: NEWARK, NEW JERSEY

Date:

SEP 14 2009

IN RE:

Petitioner:

Beneficiary:

PETITION: Petition to Classify Orphan as an Immediate Relative Pursuant to section 101(b)(1)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(F).

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


John F. Grissom

Acting Chief, Administrative Appeals Office

DISCUSSION: The Newark field office director denied the Form I-600, Petition to Classify Orphan as an Immediate Relative, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The field office director's decision will be withdrawn and the matter remanded for further action in accordance with this decision.

The petitioner seeks classification of an orphan as an immediate relative pursuant to section 101(b)(1)(F) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101(b)(1)(F). The district director denied the petition on the basis of his determination that the petitioner had failed to establish that the beneficiary qualified for classification as an orphan as the term is defined at section 101(b)(1)(F)(i) of the Act.

Section 101(b)(1)(F)(i) of the Act defines an orphan, in pertinent part, as:

a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence; *Provided*, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States[.]

The regulation at 8 C.F.R. § 204.3(b) states, in pertinent part, the following:

Abandonment by both parents means that the parents have willfully forsaken all parental rights, obligations, and claims to the child, as well as all control over and possession of the child, without intending to transfer, or without transferring, these rights to any specific person(s). Abandonment must include not only the intention to surrender all parental rights, obligations, and claims to the child, and control over and possession of the child, but also the actual act of surrendering such rights, obligations, claims, control, and possession. A relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment. Similarly, the relinquishment or release of the child by the parents to a third party for custodial care in anticipation of, or preparation for, adoption does not constitute abandonment unless the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) is authorized under the child welfare laws of the foreign-sending country to act in such a capacity. A child who is placed

temporarily in an orphanage shall not be considered to be abandoned if the parents express an intention to retrieve the child, are contributing or attempting to contribute to the support of the child, or otherwise exhibit ongoing parental interest in the child. A child who has been given unconditionally to an orphanage shall be considered to be abandoned.

* * *

Competent authority means a court or governmental agency of a foreign-sending country having jurisdiction and authority to make decisions in matters of child welfare, including adoption.

* * *

Incapable of providing proper care means that a sole or surviving parent is unable to provide for the child's basic needs, consistent with the local standards of the foreign sending country.¹

* * *

Surviving parent means the child's living parent when the child's other parent is dead, and the child has not acquired another parent within the meaning of section 101(b)(2) of the Act. In all cases, a surviving parent must be *incapable of providing proper care* as that term is defined in this section.

The petitioner, a fifty-two-year-old citizen of the United States, filed the Form I-600 on February 8, 2005 in Newark, New Jersey. The beneficiary, who is the petitioner's niece, was born in Guyana on June 20, 1989. The beneficiary's biological mother died on July 20, 2001.

As noted by the field office director in her July 27, 2006 notice of intent to deny (NOID) the petition, an officer from the Fraud Prevention Unit at the United States Embassy Consular Section in Georgetown, Guyana interviewed the beneficiary, as well as the woman identified by the beneficiary as her stepmother, on November 29, 2005. As noted by the field office director, the officer from the Fraud Prevention Unit determined that the beneficiary was not an orphan. The officer noted that the beneficiary lives with her father; that her stepmother plays an active

¹ 8 C.F.R. § 204.3(b) states, in pertinent part, the following:

Foreign-sending country means the country of the orphan's citizenship, or if he or she is not permanently residing in the country of citizenship, the country of the orphan's habitual residence. This excludes a country to which the orphan travels temporarily, or to which he or she travels either as a prelude to, or in conjunction with, his or her adoption and/or immigration to the United States.

role in her life; and that the family falls into the Guyanese middle class. The field office director's NOID provided, in pertinent part, the following information from the officer's report:

Non Pariel, a middle class neighborhood, established in 1996, is located about 17 miles from Georgetown. The beneficiary . . . lives in a three bedroom two storied concrete house; the house is painted and in good condition. . . .

[The beneficiary] related that from [the death of her biological mother] she has been under the watchful eyes of her father. She said that her father is a building contractor and is usually busy but not too busy to [be] part of their personal lives.

[The beneficiary] said her father buys groceries regularly and the house is never short of anything to eat. She receives a weekly allowance of GUY\$3000 (US \$ 15.00) and was in praise of her father. [The beneficiary] said she was attending the St. John's Secondary school in Georgetown but didn't get a chance to write her CXC examinations because she was in the United States for almost one year. . . .

[The beneficiary] also informed us that she has a stepmother . . . who lives opposite her home. She said her father's time is shared between the two homes; [h]e usually sleeps with now reputed wife but also sleeps with them when it's convenient. [The beneficiary] said her stepmother is very helpful and usually prepares meals for herself and her brothers. . . .

We interviewed the stepmother . . . who informed us that she performs the role of a surrogate mother for [the biological father's] three children . . . [the] stepmother said [that the beneficiary's father] usually reads stories to his children and spends quality time with them. . . .

[The beneficiary's father] has a car; a decent home and from all appearances seems to be living a good standard of life. In addition, the role of the stepmother is important. She informed us that she plays a very active role in [the petitioner's father's] children's lives. She said she knew them from small and is proud to be able to be a part of their lives. She cooks, washes[,] and ensures that their day-to-day needs are met . . . [the beneficiary's brother] was the first person to tell us about his stepmother.

The petitioner, through counsel, responded to the field office director's NOID on September 1, 2006. In her August 31, 2006 affidavit, the petitioner stated that the beneficiary has "suffered immensely from a lack of parental support" since the death of her biological mother. She stated that the beneficiary's biological father has difficulty finding work. When he does find work, he must leave the beneficiary alone to care for her two younger brothers, and that she receives no assistance from anyone during these times. The petitioner states that the information regarding the beneficiary's stepmother "is simply untrue"; that, to her knowledge, "there is no legal

relationship” between the beneficiary’s father “and the person referred to as the ‘stepmother’”; and that she is not aware of any assistance the stepmother provides the children. The petitioner stated that, due to the neglect of her father, the beneficiary is not attending school.

In his September 28, 2006 affidavit, the beneficiary’s biological father stated that the woman identified by the beneficiary as her stepmother “has her hands full with her own five children and has neither the time nor the interest in assisting me or my family in any way.” He stated that “the picture painted by the notice of this woman acting as surrogate mother of my children is not accurate.”

The field office director denied the petition on September 29, 2008. Citing to 8 C.F.R. § 204.3(b), the field office director determined that the petitioner had failed to demonstrate “abandonment by both parents” for two reasons. First, the field office director noted that 8 C.F.R. § 204.3(b) specifically states that a biological parent cannot intend to transfer, or transfer, parental rights, obligations, and claims to the child, as well as all control over and possession of the child, to any specific person. As made clear in his affidavits, the beneficiary’s biological father attempted to transfer his parental rights, obligations, and claims directly to a specific person: namely, the petitioner. Second, the field office director noted that the beneficiary was still living with her father. The regulation at 8 C.F.R. § 204.3(b) specifically states that, in order for the beneficiary to be considered to have been abandoned by both parents, the mere intention to surrender all parental rights, obligations, and claims to the child is insufficient. The actual act of surrendering such rights, obligations, and claims must also have occurred. Although the record does indicate that the beneficiary’s biological father is willing to surrender all parental rights, obligations, and claims to the beneficiary, the record is clear that he has not actually done so.

Counsel submitted a timely appeal on October 29, 2008.² Counsel asserts that because the beneficiary’s biological mother is deceased, the field office director erred in applying “abandonment by both parents” requirements rather than the “surviving parent” requirements to the petitioner’s case. Counsel asserts that the beneficiary’s biological father is incapable of caring for the beneficiary, and counsel concludes that the beneficiary therefore meets the definition of “orphan” as set forth in section 101(b)(1)(F) of the Act.

The AAO agrees with counsel’s analysis, and finds that the field office director applied the 8 C.F.R. § 204.3(b) “abandonment by both parents” requirements to the petitioner’s case in error. Where it is established that the beneficiary has only one surviving parent, the definition of “abandonment by both parents” found at 8 C.F.R. § 204.3(b) should not be referred to or relied upon in the adjudication of the I-600 petition. Rather the definitions of “surviving parent” and “incapable of providing proper care” are the relevant definitions in 8 C.F.R. § 204.3(b).

² The box at section two of the Form I-290B was marked to indicate that a brief and/or evidence would be sent within thirty days. The AAO, however, did not receive this additional brief and/or evidence. Thus, the AAO deems the record complete and ready for adjudication.

No language in the definitions of “surviving parent” or “incapable of providing proper care” specifically prohibits a surviving parent from relinquishing or releasing his or her child to a specific individual in preparation for an adoption. Accordingly, any evidence in the record which shows that the beneficiary’s biological father relinquished his parental rights for a specific adoption does not bear on the determination of whether the beneficiary, who has only one surviving parent, may be classified as an “orphan.”

As such, the AAO finds that the field office denied the petition in error, and the AAO withdraws the field office director’s September 29, 2008 decision. The petition, nonetheless, may not be approved, as the record as currently constituted does not establish that the beneficiary meets the definition of an “orphan” as defined at section 101(b)(1)(F) of the Act, 8 U.S.C. § 1101(b)(1)(F).

The regulation at 8 C.F.R. § 204.3(d) states, in pertinent part, the following:

(d) *Supporting documentation for a petition for an identified orphan. . . .*

- (1)(iii)(C) If the orphan has only a sole or surviving parent, as defined in paragraph (b) of this section, evidence of this fact and evidence that the sole or surviving parent is incapable of providing for the orphan’s care and has irrevocably released the orphan for emigration and adoption; and
- (iv) Evidence of adoption abroad or that the prospective adoptive parents have, or a person or entity working on their behalf has, custody of the orphan for emigration and adoption in accordance with the laws of the foreign-sending country . . .

Accordingly, the two issues at hand are whether the petitioner has established (1) that the beneficiary’s biological father is “incapable of providing care,” i.e., whether he is unable to provide for the beneficiary’s basic needs, consistent with the local standards of Guyana; and (2) whether an adoption has occurred abroad, or that the petitioner has, or a person or entity working on behalf of the petitioner has, custody of the beneficiary for emigration and adoption in accordance with the laws of Guyana.

As indicated above, the first issue to be determined in this case is whether the record demonstrates that the beneficiary’s biological father is “incapable of providing care,” i.e., whether he is unable to provide for the beneficiary’s basic needs, consistent with the local standards of Guyana.

The investigation conducted by the Fraud Prevention Unit, whose findings were provided to the petitioner in the July 27, 2006 NOID, paints an image of the beneficiary’s life far different than that painted by the testimony of the petitioner and the beneficiary’s biological father in their affidavits. The Fraud Prevention Unit’s investigation indicated that the beneficiary lives a

middle class lifestyle and has the love and support of both her biological father and her stepmother. The petitioner's claim that the beneficiary's father is unable to provide proper care is based solely on the testimony of the petitioner and the beneficiary's biological father, which conflicts directly with the information obtained by the Fraud Prevention Unit. If the woman described by the beneficiary as her stepmother in fact has neither the time nor the interest in assisting the family in any way, as asserted by the beneficiary's stepfather in his affidavit, then it is unclear why she told the Fraud Prevention Unit that she is a surrogate mother to the children. Nor does the petitioner provide any basis for her statement that "there is no indication that this person" assists "the children in any way," when such indication was made by that woman herself. The testimony of the petitioner and of the beneficiary's biological father directly contradicts the testimony of the beneficiary, and the woman identified by the beneficiary as her stepmother, to the Fraud Prevention Unit, and no effort has been made to resolve the discrepancies and inconsistencies of record. Neither the petitioner nor the beneficiary's biological father have attempted to explain why the beneficiary and the woman she identified as her stepmother provided the information they now claim to be incorrect.

Nor has the petitioner submitted any documentation to demonstrate that the beneficiary's biological father is incapable of providing proper care. In this case, there are unresolved contradictory statements, no documentary evidence to support the claims of the petitioner, and no authoritative reports on local standards of living in Guyana beyond the petitioner's generalized references to "depressed economic conditions" in Guyana and their effect on the beneficiary. As a result, such statements cannot be given much weight. Nor has any evidence been submitted to document the petitioner's assertions that she assists the family financially, or that she purchased the beneficiary's birthfather's car. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

For all of these reasons, the record of proceeding as it is currently constituted fails to establish that the beneficiary's sole surviving parent is incapable of providing proper care to the beneficiary.

The second issue to be determined in this case is whether an adoption has occurred abroad, or that the petitioner has, or a person or entity working on behalf of the petitioner has, custody of the beneficiary for emigration and adoption in accordance with the laws of Guyana.

There is no evidence in the record to indicate that the petitioner has legally adopted the beneficiary in Guyana. Nor is there any indication that the petitioner has custody of the beneficiary for emigration and adoption in accordance with the laws of Guyana, or that a person or entity working on behalf of the petitioner had custody of the beneficiary for emigration and adoption in accordance with the laws of Guyana.

According to U.S. State Department guidance on intercountry adoption,³ the government office responsible for adoptions in Guyana is the Adoption Board:

Prospective adoptive parents must apply in person to the Adoption Board (“the Board”). The application form, First Schedule, consist of two parts, Form A and Form B. Form A is completed and signed by the prospective adoptive parents and consists of biographical data for the applicants and prospective child. It also includes references for the prospective adoptive parents. Form B is a medical certificate for the child or children to be adopted, which must be completed by a duly qualified medical practitioner. Prospective adoptive parents must obtain these forms in person from the Board.

When the prospective adoptive parents file the First Schedule, they will received an acknowledgement slip with an appointment date for the initial adoption interview. The prospective adoptive parents, child, and biological parents must appear before the Board at the interview. The appointments are usually scheduled within 4-6 weeks after the application is filed. The Board will undertake a request for an expedited appointment but it is not guaranteed.

A social worker interviews the birth parents, prospective adoptive parents, and children separately at the initial adoption interview. At the conclusion of the interview, assuming a signed and witnessed consent is obtained from the biological parents, or, if absent, the Board is satisfied that the birth parent(s) cannot be located, the prospective adoptive parents are given an informational letter from the Board. This letter provides instructions for the prospective adoptive parents’ attorney to begin preparing the court papers for the adoption process. Two copies of this letter must also be filed in the High Court by the attorney for the applicants, along with an application to appoint the Board guardian ad litem of the child. Obtaining the order may take up to six months depending on the attorney’s skill and the court calendar.⁴

There is no evidence in the record that the petitioner has complied with any of these requirements. The record of proceeding as it is currently constituted fails to establish that an adoption has occurred abroad, or that the petitioner has, or a person or entity working on behalf of the petitioner has, custody of the beneficiary for emigration and adoption in accordance with the laws and procedures of Guyana. Accordingly, the AAO finds that the petitioner has failed to establish that the beneficiary meets the definition of “orphan” as set forth at section 101(b)(1)(F) of the Act.

The AAO withdraws the field office director’s September 29, 2008 decision denying the petition, as she adjudicated the petition under an incorrect standard. However, the petition may not be

³ See <http://adoption.state.gov/country/guyana.html> (accessed August 7, 2009).

⁴ See *id.*

approved, as the record of proceeding does not establish (1) that the beneficiary's biological father is "incapable of providing care," i.e., that he is unable to provide for the beneficiary's basic needs, consistent with the local standards of Guyana; and (2) that an adoption has occurred abroad, or that the petitioner has, or a person or entity working on behalf of the petitioner has, custody of the beneficiary for emigration and adoption in accordance with the laws of Guyana. As the field office director did not address these matters, the petition will be remanded for further consideration of this petition. Specifically, the field office director must make a determination as to whether the beneficiary's biological father is "incapable of providing care," i.e., whether he is unable to provide for the beneficiary's basic needs, consistent with the local standards of Guyana; and whether an adoption has occurred abroad, or that the petitioner has, or a person or entity working on behalf of the petitioner has, custody of the beneficiary for emigration and adoption in accordance with the laws of Guyana. The field office director may afford the petitioner reasonable time to provide evidence pertinent to the resolution of these issues. The field office director shall then render a new decision based on the evidence of record as it relates to the relevant regulatory requirements for eligibility.

As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The field office director's September 29, 2008 decision is withdrawn. The petition is remanded to the field office director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.